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BRIEF

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In the Supreme Court of the United States

DAVID JENNINGS, *ET AL.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *ET AL.*,
INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS SIMILARLY SITUATED,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, PRETRIAL JUSTICE INSTITUTE, CENTER FOR LEGAL AND EVIDENCE-BASED PRACTICES, AND JUDGE DAVID L. BAZELON CENTER IN SUPPORT OF RESPONDENTS

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18 U.S.C. § 3161(c)(1) (2012) 11, 14

Ariz. Rev. Stat. Ann. § 13-3961(D) (2015) 13

Ariz. Rev. Stat. Ann. § 36-540(F) (2015) 16

Ark. Code Ann. § 20-47-215(c)(1)(A) (2016) 16

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Del. Code Ann. tit. 16, § 5011 (2016) 17

Fla. Stat. § 907.041(4)(f) (2016) 11

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Okla. Stat. tit. 43A, § 5-420(A) (2016) 17

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S.C. Code Ann. § 22-5-510(B) (2016) 11

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OTHER AUTHORITIES

ABA Standards for Criminal Justice: Pretrial Release (3d ed. 2007) 9, 21

Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1 (2015) 7

Tara Boh Klute & Mark Heyerly, Kentucky Pretrial Services, *Report on Impact of House Bill 463: Outcomes, Challenges and Recommendations*, Kentucky Pretrial Services (June 2012) 21

Laura & John Arnold Foundation, *Public Safety Assessment: Risk Factors and Formula* (2016) 18, 20

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National Conference of Chief Justices, Resolution 3, *Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release* 21

National Conference of State Legislatures, *Pretrial Release Eligibility* (Mar. 2013) 9

New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* (2011) 7

Mark L. Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 Geo. Immigr. L.J. 45 (2014) 22

Michael L. Perlin, *Mental Disability Law: Civil and Criminal* (2d ed. 2013) 12, 17

Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* (May 2015) 18

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INTERESTS OF *AMICI CURIAE*

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers (the "NACDL"), the Pretrial Justice Institute (the "PJI"), the Center for Legal and Evidence-Based Practices (the "CLEBP"), and the Judge David L. Bazelon Center for Mental Health Law (the "Bazelon Center").[1]

- The NACDL is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, it has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliates. The NACDL's mission is to ensure justice and due process for the accused and to promote the proper and fair administration of justice.
- The PJI is a national organization working to advance safe, fair, and effective pretrial justice that honors and protects all people. Since the 1970s, the PJI has worked to advance knowledge and practice in criminal justice through research, demonstration projects, and technical assistance, with a special focus on the fairness and efficacy of pretrial justice.
- The CLEBP is a non-profit corporation that has worked with jurisdictions across the country to

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than the *amici curiae* and their members, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and Respondents consented to the filing of this brief.

improve the administration of their bail systems. The CLEBP's mission is to improve bail systems across the country by promoting rational, fair, and transparent legal and evidence-based pretrial practices to achieve safer and more equitable communities as well as cost-effective government.

- The Bazelon Center, founded in 1972 as the Mental Health Law Project, is a national non-profit advocacy organization that provides legal assistance to individuals with mental disabilities. Through litigation, public policy advocacy, training and education, the Bazelon Center works to advance the rights and dignity of individuals with mental disabilities in all aspects of life.

The *amici curiae* have been leading advocates on behalf of individuals who have been subjected to detention by the government. Consistent with their respective missions, the *amici curiae* have devoted their resources to ensuring that all individuals deprived of liberty—including the hundreds of thousands of non-citizens who are detained as part of the immigration process—receive the full protections of the law.

SUMMARY OF ARGUMENT

The immigration system is an outlier among comparable detention regimes because it fails to provide safeguards required under well-settled principles of due process. The Ninth Circuit's decision rectified this anomaly and brought the protections of the immigration detention system closer in line with those provided in the pretrial justice and civil

commitment regimes. Affirmance of the Ninth Circuit's decision is warranted for the reasons stated in the Respondents' brief. The *amici curiae* respectfully submit this brief to highlight two additional considerations supporting affirmation.

First, the protections the Ninth Circuit ordered for non-citizens subjected to prolonged immigration detention accord with those routinely provided in the pretrial and civil commitment detention schemes in the federal system and the fifty states. The statutes and case law governing these analogous civil detention contexts regularly require automatic hearings at which the government bears the burden of justifying civil detention, by clear and convincing evidence. The civil detention case law also recognizes that the longer an individual spends in detention, the greater the deprivation of liberty that the individual suffers. In the pretrial context, this concern is mitigated by requirements that individuals be brought to trial within strict time limits. In the civil commitment context, this concern is ameliorated by mandatory periodic hearings to ensure that a person is not detained for any longer than necessary. These laws thus support the Ninth Circuit's requirement of periodic hearings for class members detained past six months, as well as its requirement that the length of past detention be considered at such hearings.

Second, the experiences of state pretrial justice systems demonstrate that granting a hearing and other basic safeguards to non-citizens subjected to prolonged detention would not undermine the government's interest in preventing flight or crime. Recent studies of evidence-based practices demonstrate that actuarial risk assessment tools can help judicial officers make far

more informed evaluations of an individual's likelihood of failing to appear for court or committing new criminal offenses. Many individuals with past convictions—such as class members subject to detention under 8 U.S.C. § 1226(c)—have low rates of criminal activity and high rates of appearance for court proceedings. Detention in such circumstances is unnecessary.

ARGUMENT

This case concerns the statutory and due process rights of non-citizens subject to prolonged detention by the government under 8 U.S.C. §§ 1225(b), 1226(a), and 1226(c). The Ninth Circuit construed these immigration statutes to require that class members detained for a prolonged period during the pendency of removal proceedings have a right to (1) an automatic bond hearing at which (2) the government must prove the need for detention by clear and convincing evidence, and (3) additional periodic hearings at which the immigration judge must take into account the length of past detention in evaluating the necessity of continued detention. The *amici curiae* submit that the Ninth Circuit's decision was consistent with this Court's civil detention jurisprudence, and brings the immigration detention system closer in line with the pretrial detention and civil commitment laws of the federal government and the fifty states. Moreover, the experiences of those states show that the protections provided would not, as Petitioners fear, jeopardize the efficient and safe operation of the immigration process.

This Court has specifically relied on precedent from the pretrial and civil commitment contexts in determining due process standards applicable to immigration detention. *See Zadvydas v. Davis*, 533

U.S. 678, 690 (2001) (relying on pretrial justice and civil commitment case law in evaluating civil detention of non-citizens). In addition, this Court often looks for a consensus among jurisdictions to support its due process jurisprudence. *See, e.g., Addington v. Texas*, 441 U.S. 418, 426 (1979) (rejecting preponderance standard for involuntary commitment in part based on near unanimity of laws governing legal standard in commitment); *Jackson v. Indiana*, 406 U.S. 715, 732-35 (1972) (surveying laws to determine whether due process barred indefinite commitment of criminal defendant due to incompetency).

Here, the federal government and the states are in accord: the government's ability to deprive an individual of liberty through civil detention must be conditioned on rigorous procedural protections to ensure that such detention comports with the government's interests in detention, particularly when detention becomes prolonged. The following procedural safeguards, which the Ninth Circuit mandated in prolonged detention proceedings, are routinely—and often universally—afforded detainees in the pretrial and civil commitment systems:

1. **Automatic Hearings**: The federal government and all fifty states are in accord that an individual subject to pretrial detention or civil commitment must be granted an automatic hearing (*i.e.*, one not conditioned on the individual's request) on the necessity of such detention. *See infra* Argument § I.B. Specifically, in the pretrial system, a criminal defendant may only be detained after a hearing before a judge tied to whether the individual is a danger to the community or a flight risk. *See infra id.* Likewise, in civil commitment systems, an individual detained based

on a purported mental illness and dangerousness is entitled to a hearing before a judicial officer to determine if there is sufficient justification for commitment. *See infra id.*

2. **Heightened Burden of Proof:** At pretrial detention hearings in the criminal justice system, the government routinely must prove by clear and convincing evidence that the defendant poses a danger to the community or a risk of flight. *See infra* Argument § I.C. Likewise, the federal government and the states unanimously require the government to prove by, at least, clear and convincing evidence that an individual meets the substantive requirements for civil commitment to justify so serious a deprivation of liberty. *See infra id.*

3. **Periodic Hearings and Consideration of Length of Prior Detention:** Federal and state case law uniformly recognize that, when detention increases in duration, it imposes a more severe deprivation of liberty. In the federal and state pretrial justice systems, the practical maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act, state law analogues, and the Sixth Amendment right to a speedy trial. *See infra* Argument § I.D. The absence of any such comparable limits to the length of immigration proceedings makes periodic review of immigration detention crucial to prevent unjustifiably prolonged detention. *See Demore v. Kim*, 538 U.S. 510, 531 (2003) (affirming detention only for a "limited period" during removal proceedings). Respondents' expert found that class members' median length of detention was approximately one year. *See* Joint App'x 71-73. In contrast, the duration of pretrial detention for criminal

defendants is carefully limited by protections such as the Speedy Trial Act—which sets a default deadline of seventy days from information or indictment to trial, *see* 18 U.S.C. § 1361(c) (2012)—and its state law analogues. *See infra* Argument § I.D. In the civil commitment context, the concern of unnecessarily prolonged detention is ameliorated by a strict requirement that individuals be granted periodic review of their involuntary commitments because detention cannot continue for any longer than necessary to achieve the purpose for which an individual was committed. *See infra id.*

* * *

These protections are particularly important during prolonged immigration detention because the government does not recognize a right to appointed counsel in removal proceedings. In the absence of automatic bond hearings and the other protections required by the Ninth Circuit, it is likely (as the record in this case demonstrates) that non-citizens will suffer months or years of needless detention while their challenges to removal are resolved, often successfully.[2]

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[2] Numerous studies demonstrate the wide disparity in outcomes between immigrants with and without legal representation. *See, e.g.*, Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 2 (2015) (finding that fourteen percent of detained immigrants secured representation and that represented detainees were fifteen times more likely to seek relief from removal and 5.5 times more likely to obtain relief); New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* 3 (2011) (finding that represented immigrants were six times more likely to secure relief from removal).

The *amici curiae* submit that adopting these protections would not lead to the dire consequences predicted by Petitioners. On the contrary, numerous studies in the pretrial detention context demonstrate that evidence-based statistical risk assessment instruments can guide judicial officers in deciding whether to release a defendant during the pretrial phase. These mechanisms help ensure that detention is only imposed when truly necessary to address concerns about flight or criminal activity.

I. The Federal Government And The States Routinely Guarantee Individuals Subject To Pretrial Detention And Civil Commitment Safeguards Consistent With Those Mandated By The Ninth Circuit.

The protections that the Ninth Circuit ordered for prolonged immigration detention are widely provided to pretrial detainees and individuals subject to civil commitment.

A. The Pretrial Detention and Civil Commitment Laws Provide Significant Protections Consistent With the Requirements of Due Process.

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 533 U.S. at 690. The government violates that right unless the detention is reasonably related to its purpose and ordered in a proceeding with "adequate procedural protections." *Id.*

Consistent with these due process principles, all the states and the District of Columbia apply a

presumption of release during the pretrial period. *See, e.g.*, National Conference of State Legislatures, *Pretrial Release Eligibility* (Mar. 2013), http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx (last visited Oct. 24, 2016); D.C. Code § 23-1321(b) (2012); *DeWolfe v. Richmond*, 76 A.3d 1019, 1033 (Md. 2013); N.C. Gen. Stat. § 15A-534(b) (2016); *see also* ABA Standards for Criminal Justice: Pretrial Release, Standard 10-1.1 at 38 (3d ed. 2007), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf (last visited Oct. 24, 2016) ("[T]he thrust of these Standards is toward release of the defendant unless there are strong reasons for detention."). Likewise, in the federal pretrial system, the Bail Reform Act of 1984 (the "Bail Reform Act"), 18 U.S.C. § 3141 (2012), *et seq.*, requires that "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence" that detention is necessary prior to trial. *United States v. Salerno*, 481 U.S. 739, 750 (1987). Thus, in the federal system as well, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* at 755.

Similarly, individuals subject to civil commitment are guaranteed due process safeguards before the state can, *e.g.*, require them to undergo treatment in hospitals or other settings. *See Addington*, 441 U.S. at 425 ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."); *see also O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J., concurring) ("There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an

individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law."). The states also recognize that due process requires significant protections—including a hearing at which the government must prove the need for detention by clear and convincing evidence—before a person can be civilly committed against his or her will. *See, e.g., People v. Stevens*, 761 P.2d 768, 774 (Colo. 1988) (holding that clear and convincing evidence is necessary "to justify the massive curtailment of liberty inherent in involuntary commitment"); *People v. McQuillan*, 221 N.W.2d 569, 574 (Mich. 1974) ("The United States Supreme Court has made it clear that commitment to a mental hospital is deprivation of liberty. Commitment may not be accomplished without proper notice and hearing to determine mental incompetence."); *In Interest of M.S.H.*, 466 N.W.2d 151, 152 (N.D. 1991) ("[O]ur law authorizes an involuntary commitment only if the petitioner proves by clear and convincing evidence that the respondent is a person requiring treatment[.]").

B. The Federal Government and All Fifty States Guarantee Automatic Hearings to Consider the Necessity of Pretrial Detention and Civil Commitment.

Automatic hearings to consider the government's justification for civil detention are universally required in both the pretrial detention and civil commitment regimes.

All fifty states plus the District of Columbia unanimously recognize the right to an automatic hearing at the outset of pretrial detention. *See, e.g., Thomas v. State*, 542 S.W.2d 284, 289 (Ark. 1976) ("[Arkansas Rule of Criminal Procedure 8.5] mandates

that the judicial officer hold a pretrial release inquiry upon the first appearance of an arrested person."); *Clark v. Superior Court*, 14 Cal. Rptr. 2d 49, 51 (Ct. App. 1992) ("[R]egardless of how a defendant is charged, our Constitution provides the right to a bail hearing."); Fla. Stat. § 907.041(f) (2016) ("The pretrial detention hearing shall be held within 5 days of the filing by the state attorney of a complaint to seek pretrial detention."); *Wheeler v. State*, 864 A.2d 1058, 1064 (Md. Ct. App. 2005) ("Under Maryland Rule 4-216(f), a defendant denied pretrial release by a District Court commissioner receives a review hearing conducted by a District Court judge."); *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 902 (Mass. 2004) ("Because a defendant's liberty, a fundamental right, is at stake at a bail hearing, the principles of procedural due process . . . are implicated. They include the right to be heard[.]"); S.C. Code Ann. § 22-5-510(B) (2016) ("A person charged with a bailable offense must have a bond hearing within twenty-four hours of his arrest[.]"); *Ex Parte Nelson*, 594 S.W.2d 67, 69 (Tex. Crim. App. 1980) ("It was error to deny bail without a hearing.").[3]

Likewise, in federal pretrial proceedings, the Bail Reform Act requires a prompt, automatic hearing to determine whether the defendant should be released or detained pending trial. *See* 18 U.S.C. § 3142(a) (2012); *see also Salerno*, 481 U.S. at 747 (citing 18 U.S.C. § 3161(c)(1) (2012)). In making this determination, the

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[3] Some states require a different governmental showing for a narrow set of charges, *e.g.*, capital offenses or treason. *See, e.g., Blount v. State*, 511 A.2d 1030, 1039 (Del. 1986). But all states require that a criminal defendant receive a hearing tied to whether the individual poses a flight risk or danger.

Bail Reform Act, as the default, mandates the release of a person pending trial unless the court finds that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community[.]" *Salerno*, 481 U.S. at 742 (quoting 18 U.S.C. § 3142(e) (2012)).

In the civil commitment context, federal law requires automatic individual commitment hearings based on the inherent constitutional protections necessary when a person's liberty is taken. *See Vitek v. Jones*, 445 U.S. 480, 495 (1980) (affirming due process right to an adversary hearing prior to involuntary transfer to a mental hospital); *see also Bailey v. Pataki*, 708 F.3d 391, 393 (2d Cir. 2013) ("[T]he constitutional principle that, absent some emergency or other exigent circumstance, an individual cannot be involuntarily committed to a psychiatric institution without . . . a predeprivation hearing [is] firmly established." (citing *Vitek*)); *see also* Michael L. Perlin, *Mental Disability Law: Civil and Criminal* tit. 1-2, § 2C-4 (2d ed. 2013) ("There is no longer any serious question as to the constitutional requirement of some kind of a judicial hearing prior to an order of involuntary civil commitment.").

Likewise, all fifty states and the District of Columbia unanimously recognize that due process requires that individuals subject to civil commitment proceedings be provided a meaningful, automatic hearing at which the state must prove the need for commitment. *See, e.g., State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 122, 125 (W. Va. 1974) ("[L]iberty . . . is a right of the very highest nature. . . . [Therefore,] the same standards . . . are required in a commitment

hearing as would be applicable in a criminal prosecution. The subject individual . . . must be present in person and cannot waive that right.") (quotation marks omitted); *McQuillan*, 221 N.W.2d at 574 ("[C]ommitment to a mental hospital is deprivation of liberty. Commitment may not be accomplished without proper notice and hearing to determine mental incompetence."); *In re Kevin C.*, 850 A.2d 341, 344 (Me. 2004) ("Both the private and governmental interests in an involuntary commitment proceeding are substantial. [The patient] has a fundamental liberty interest at stake . . . [and] the process employed must . . . be substantial in order to ensure that risk of error associated with a commitment determination is low.").

C. The Federal Government and the States Routinely Require the Government to Bear the Burden of Justifying Pretrial Detention or Civil Commitment by Clear and Convincing Evidence.

To justify pretrial detention at a bond hearing under the Bail Reform Act, the burden of proof is on the government to show by "clear and convincing evidence" that detention is necessary because "no condition or combination of conditions will reasonably assure the safety of any other person and the community[.]" 18 U.S.C. § 3142(f) (2012). Numerous state legislatures and courts have also expressly adopted this foundational requirement and require the government to prove the need for pretrial detention by "clear and convincing evidence." *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3961(D) (2015); *Fry v. State*, 990 N.E.2d 429, 445-46 (Ind. 2013); *State v. Stradt*, 556 N.W.2d 149, 151 (Iowa 1996); *Mendoza v. Commonwealth*, 673

N.E.2d 22, 25 (Mass. 1996); *Brill v. Gurich*, 965 P.2d 404, 408 (Okla. Ct. Crim. App. 1998).

Similarly, the Due Process Clause requires the government to present "clear and convincing evidence" before an individual can be civilly committed. *Addington*, 441 U.S. at 419-20, 433. In accordance with *Addington*, all fifty states require the government to prove the necessity of commitment by at least clear and convincing evidence to satisfy due process, and some states impose an even higher standard of proof. *See, e.g.*, *Shivaee v. Commonwealth*, 613 S.E.2d 570, 578 (Va. 2005) ("[The Supreme Court] clearly stated that the 'clear and convincing' evidentiary standard is the minimum standard that may be used in a civil commitment proceeding."); *Superintendent of Worcester State Hosp. v. Hagberg*, 372 N.E.2d 242, 246 (Mass. 1978) (holding that civil commitment requires proof beyond a reasonable doubt).

D. The Pretrial Detention and Civil Commitment Regimes Recognize the Relationship Between Length of Detention and the Gravity of the Due Process Concern.

In the federal and state pretrial justice systems, the length of pretrial detention is "limited by the stringent time limitations of the Speedy Trial Act," *Salerno*, 481 U.S. at 747 (citing 18 U.S.C. § 3161(c)(1)), its state law analogues, and the Sixth Amendment right to a speedy trial. *See Klopfer v. North Carolina*, 386 U.S. 213, 221-23 (1967); *see also* R.I. Gen. Laws § 12-13-7 (2016); Vt. Stat. Ann. tit. 13, § 7553b (2016).

And where a criminal defendant is nevertheless detained for a prolonged period, federal courts have expressly considered the length of past detention when

evaluating whether detention violates due process. *See, e.g., United States v. Orena*, 986 F.2d 628, 630 (2d Cir. 1993) (considering "length of detention" as one of the factors determining whether detention violates due process); *United States v. Hare*, 873 F.2d 796, 801 (5th Cir. 1989) ("In determining whether due process has been violated, a court must consider not only factors relevant in the initial detention decision . . . but also additional factors such as the length of the detention that has in fact occurred or may occur in the future, the non-speculative nature of future detention, the complexity of the case, and whether the strategy of one side or the other occasions the delay."); *United States v. Accetturo*, 783 F.2d 382, 388 (3d Cir. 1986) ("[A] determination under the Bail Reform Act that detention is necessary is without prejudice to a defendant petitioning for release at a subsequent time on due process grounds. . . . [T]he evidence admitted at the initial detention hearing, evaluated against the backdrop of the duration of pretrial incarceration and the causes of that duration, may no longer justify detention.").

In the civil commitment context, to ensure that detention is not unnecessarily prolonged, due process requires periodic review. This Court has expressly held that even if an individual's commitment was justified at the outset, confinement cannot continue after the basis for the confinement no longer exists. *See O'Connor*, 422 U.S. at 574-75 ("Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed."); *see also*

Jackson, 406 U.S. at 738 (holding that a person committed based on incapacity to stand trial "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future").

Consistent with this Court's case law, the Supreme Courts of Connecticut and New Jersey held in two foundational cases that due process requires periodic judicial review for involuntarily committed individuals. *See Fasulo v. Arafeh*, 378 A.2d 553, 558 (Conn. 1977) ("[P]laintiffs have been denied their due process rights . . . by the state's failure to provide them with periodic judicial review of their [civil] commitments in the form of state-initiated recommitment hearings, replete with the safeguards of the initial commitment hearings, at which the state bears the burden of proving the necessity for their continued confinement."); *State v. Fields*, 390 A.2d 574, 580 (N.J. 1978) (holding that individuals indefinitely committed to mental institutions following a criminal acquittal by reason of mental disability are entitled to periodic review hearings at which the state bears the burden of justifying continued detention).

Nearly all of the other states have followed suit, with state statutes or courts requiring either a new commitment proceeding after a certain period of time or periodic review of the necessity of continued commitment, and many states require such petition or review every six months or less. *See, e.g.*, Ariz. Rev. Stat. Ann. § 36-540(F) (2015) (involuntary inpatient treatment order limited to 90, 180, or 365 days depending on patient category); Ark. Code Ann. § 20-47-215(c)(1)(A) (2016) (continued commitment beyond

180-day period requires new petition by treatment staff); Colo. Rev. Stat. § 27-65-109 (2016) (continued commitment requires petition for extension at six-month intervals); Del. Code Ann. tit. 16, § 5011 (2016) (court must convene hearing at least every three months to consider whether continued involuntary treatment is necessary); Okla. Stat. tit. 43A, § 5-420(A) (2016) (involuntary commitment must be reviewed at least once every three months); *Chavis v. Yankton Cnty.*, 654 N.W.2d 801, 804 (S.D. 2002) ("[A]n individual is entitled to periodic review hearings until such time as he or she is discharged."); D.C. Code § 21-546 (2012) (requiring consideration of need for continued commitment at least every ninety days); *see also* Perlin, *supra* § 2C-6.5c ("Since *Fasulo* and *Fields*, there has come the 'virtual demise' of indeterminate involuntary institutionalization, with over forty states providing a durational limit on commitment.").

II. Modern Pretrial Practices Demonstrate That Categorical Detention Of Individuals With A Past Conviction Is Not Necessary To Prevent Criminal Activity And Flight.

The experiences of the states demonstrate that the government may meet its interest in preventing flight risk and danger with mechanisms far less restrictive than the categorical detention of large groups of individuals. In particular, many jurisdictions now utilize empirically grounded risk assessment tools in fashioning conditions of release for the vast majority of criminal defendants in pretrial detention.

An empirically derived pretrial risk assessment tool is one that "has been demonstrated through an empirical research study to accurately sort defendants into categories showing their likelihood of having a

successful pretrial release—that is, they make all their court appearances and are not arrested on new charges." *See* Pretrial Justice Institute, *Pretrial Risk Assessment: Science Provides Guidance on Assessing Defendants* 2 (May 2015). The instruments first identify factors that have some predictive association with risk of failure to appear or committing crimes prior to trial, then assign greater or lesser weight to those factors, depending on the strength of their predictive power. *See id.* at 2-4.

One leading organization has developed a validated risk assessment tool based on a database of over 1.5 million cases drawn from approximately 300 jurisdictions across the country. Laura & John Arnold Foundation, *Public Safety Assessment: Risk Factors and Formula* 2 (2016), http://www.arnoldfoundation.org/wp-content/uploads/PSA-Risk-Factors-and-Formula.pdf (last visited Oct. 24, 2016). Other jurisdictions have developed their own risk assessment tools based on data from their respective jurisdictions. *See* Pretrial Justice Institute, *supra* at 3. These risk assessment tools have been empirically shown to accurately sort defendants into appropriate categories based on their likelihood of flight or committing criminal activity pending trial. *See id.* at 2.

The movement toward evidence-based risk assessment in the pretrial detention context has produced two important lessons for this case. First, a prior criminal conviction does not, standing alone, mean that a defendant poses a high risk of future dangerousness or flight. Second, the government is capable of developing sophisticated means of deciding which non-citizens should be detained and which should be released. Keeping broad groups of non-citizens in

prolonged immigration custody—including based solely on a past conviction—is therefore excessive in relation to the government's interests in preventing flight risk and danger.[4]

A. A Prior Criminal Conviction Alone Does Not Render an Individual a High Risk for Future Criminal Conduct or Flight.

The fundamental premise underlying much of Petitioners' arguments as to the Section 1226(c) subclass—that providing bond hearings to prolonged detainees with certain types of convictions, including certain misdemeanors, will compromise the government's interest in preventing criminal activity or flight—is undermined by significant research on pretrial detention.

Contemporary pretrial detention research shows that an individual's prior criminal conviction does not, by itself, render an individual a high risk of committing new criminal activity or failing to make court appearances. Rather, prior criminal convictions must be weighed alongside a number of other factors to determine flight risk and danger. For example, one widely respected national risk assessment tool weighs the existence of a prior conviction with other objective

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[4] The *amici curiae* do not endorse the adequacy of current bond procedures in the pretrial context as outlined in this brief. The *amici curiae* merely submit that Petitioners' stated concerns may be addressed without recourse to mandatory detention based on broad categorizations about, for example, a detainee's past convictions. Furthermore, this section only addresses whether bond hearings should be made available—and not the myriad successful alternatives to detention in both the pretrial and civil commitment contexts.

factors, including the defendant's age, in predicting both likelihood of failure to appear and committing new criminal activity. *See* Laura & John Arnold Foundation, *supra* at 2.

The pretrial detention research also indicates that the so-called "severity" of a pending charge or prior conviction—such as whether the defendant is charged with a misdemeanor or felony—has, at most, a minimal correlation with a defendant's likelihood of committing new criminal activity or failing to appear. *See, e.g., id.* at 2 (assigning equal weight to prior misdemeanor and felony convictions in assessing risk of new offense pending trial).

The pretrial detention studies show that the prolonged detention of individuals based solely on a past conviction—as with the Section 1226(c) subclass—is unnecessary. Because many—if not most—such individuals can safely be released into the community, their detention is excessive in relation to the government's interests in preventing danger and flight.

B. Risk Assessment Tools Are Available to Guide Courts in Deciding Who Should Be Released Pending Immigration Proceedings.

The experiences of state and local jurisdictions also demonstrate that the government has the capacity to develop empirically grounded risk assessment tools that would guide judicial officers in making release decisions at prolonged detention bond hearings. For example, the state of Kentucky—which the Department of Justice has recognized as a model jurisdiction in this regard—implemented risk assessment tools with significant success. *See, e.g.*, Tara Boh Klute & Mark Heyerly, Kentucky Pretrial

Services, *Report on Impact of House Bill 463: Outcomes, Challenges and Recommendations* 4-6, 10 (June 2012) (showing that during one year-period after Kentucky's adoption of statewide risk assessment tool, greater numbers of individuals were released pretrial, while pretrial success rates increased); *see also* U.S. Department of Justice, Civil Rights Div., Opinion Letter 7-8 (Mar. 14, 2016), https://www.justice.gov/crt/file/832461/download (last visited Oct. 24, 2016) (identifying Kentucky as a model jurisdiction that has enacted effective risk assessment tools).

In response to the demonstrated success of jurisdictions that have adopted contemporary risk assessment tools, a growing chorus of respected voices—including the American Bar Association, the National Conference of Chief Justices, and the U.S. Department of Justice—are urging state and local jurisdictions to adopt empirically grounded risk assessments to guide courts in making bail decisions. *See, e.g.*, ABA Standards for Criminal Justice: Pretrial Release, Standard, *supra* at 10-1.10 at 54 (recommending that criminal justice systems "establish a pretrial services agency or program to . . . present risk assessments"); National Conference of Chief Justices, Resolution 3, *Endorsing the Conference of State Court Administrators Policy Paper on Evidence-Based Pretrial Release*, http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx (last visited Oct. 24, 2016) (endorsing "adoption of evidence-based assessment of risk in setting pretrial release conditions"); U.S. Dep't of Justice, Civil Rights Division, *supra* at 7 (urging state and local courts to adopt "objective risk

assessments by pretrial experts" as a superior means of making release decisions).

The government should apply these lessons to the immigration context. For instance, the Department of Homeland Security has implemented its own Risk Classification Assessment for use in the removal context, which it uses to determine which individuals should be released. *See* Mark L. Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 Geo. Immigr. L.J. 45, 47-48 (2014). Although this risk assessment tool has not yet been validated for use with the immigrant detainee population (as have the risk assessment instruments discussed above) and has been criticized as wrongly biased in favor of detention, *see id.* at 76-81, the government can and should develop and apply empirically based tools to meet its interests in preventing flight and danger. Doing so will be far less expensive and more efficient than the prolonged detention of hundreds of thousands of people, while preserving our most cherished constitutional principles.

CONCLUSION

The *amici curiae* urge the Court to affirm the right of class members subjected to prolonged immigration detention to (1) an automatic bond hearing (2) where the government must show by clear and convincing evidence that further detention is justified, and (3) periodic judicial review of detention decisions in which a judicial officer must consider the duration of the individuals' past detention. These procedural protections are consistent with protections provided in the pretrial detention and civil commitment contexts, and necessary to bring the immigration detention system in line with the minimum due process

requirements in connection with the prolonged detention of thousands of people. In addition, modern, evidence-based practices in the pretrial detention context indicate that a past criminal conviction alone is not an accurate predictor of danger or flight. Thus, class members—including those in the Section 1226(c) subclass—are being subjected to needless, prolonged deprivation of liberty that bears no relation to the government's justifications for detention.

Respectfully submitted,

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